

OVERLAPS AND GAPS IN DISABILITY RIGHTS, FAMILY MEDICAL LEAVE, AND WORKERS' COMPENSATION LAWS

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If you are asked about an employee's legal right to take, or an employer's legal obligation to grant, time off from work, you face the unenviable task of reconciling three different areas of law. In the disability rights arena there is the Americans with Disabilities Act of 1990 ("ADA")¹ and often a state fair employment practices act as well. Leave from work is expressly governed by the federal Family Medical Leave Act of 1993 ("FMLA"), and, perhaps, state law also. Finally, there is each state's workers' compensation law. Because these statutes were enacted for significantly different purposes and many years apart, their interplay produces many overlaps, but also leaves certain gaps. Disability rights, family medical leave, and workers' compensation law have many substantive intricacies apart from those that arise when they interact with one another. A basic understanding of these three areas of law is essential for an appreciation of how and when they will interact.

I. DISABILITIES AND REASONABLE ACCOMMODATION

The statutory purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."² In certain respects the ADA is very much like other civil rights laws that prohibit discrimination on the basis of race, sex, age, or religion. The ADA expressly

adopts the basic remedial structure of Title VII of the Civil Rights Act of 1964.³ The EEOC drafts the regulations interpreting the employment-related sections of the ADA, and an individual claiming a violation of the Act must first file an EEOC charge before commencing litigation. Like most other federal civil rights statutes, the ADA applies only to employers with 15 or more employees.

In other respects, the ADA is significantly different. The ADA does not prohibit employment discrimination against the disabled *per se*. Rather it forbids employment discrimination only against “a qualified individual with a disability.”⁴ A “qualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁵ This definition introduces the doctrine of “reasonable accommodation,” which does not exist under laws preventing discrimination on the basis of race, sex, or age.⁶ The concept of a “qualified individual with a disability” plays a key role in the intersection of disability rights with family leave and workers’ compensation law.

In 1999 the United States Supreme Court handed down a trilogy of decisions that severely restricted the coverage of the ADA.⁷ Rejecting regulations adopted by the EEOC and the Department of Justice, the Supreme Court held that whether a person is “disabled” within the meaning of the Act must be evaluated only after taking into account any corrective or remedial measures the person has taken.⁸ So, for example, under

federal law a person who has hypertension that is controlled through medication does not have a “disability,” and may well have no protection under the ADA from job discrimination on the basis of that hypertension.⁹

The ADA requires an employer to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability” unless the employer can “demonstrate that the accommodation will impose an undue hardship” on its business.¹⁰ Examples of reasonable accommodations include restructuring of a position’s non-essential job duties and adjustment of the employee’s work schedule.¹¹ Although not mentioned expressly, unpaid leave may itself be a “reasonable accommodation” for a disabled employee.¹² An employer does not have to give an accommodation that violates a voluntary or negotiated seniority system.¹³

Employers may require a current employee who requests or obviously needs reasonable accommodation to submit medical proof that he or she is able to perform the essential functions of his job.¹⁴ The employer may require only such documentation as is needed to show that person has a disability and requires reasonable accommodation.¹⁵ By the same token, an employer may require an individual who is returning to his or her prior job or work schedule, after receiving an accommodation for a disability, to demonstrate that he can still perform the essential functions of the position. Employee medical examinations must be non-discriminatory and the results must be kept confidential.¹⁶

II. FAMILY AND MEDICAL LEAVE OBLIGATIONS

The FMLA “entitle[s] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.”¹⁷ The FMLA provides for up to 12 workweeks of qualifying leave during any 12-month period.¹⁸ The FMLA covers only employers with 50 or more employees.¹⁹ Only employees who have already been on the job for a year and worked at least 1,250 hours during that year are entitled to leave under the Act.²⁰ Leave for a serious health condition or to care for a spouse, parent, or child with a serious health condition may be taken on an intermittent basis if medically necessary, but leave for the birth, adoption, or foster care placement of a child may not.²¹ If intermittent leave is taken, the employer may require the employee to transfer temporarily to an equivalent position if the alternative position better accommodates the recurring periods of leave.²²

FMLA leave may be unpaid.²³ However, an employee may elect, or an employer may require the employee, to use up any accrued paid vacation or personal leave for any part of the 12 weeks of FMLA leave, with any balance being unpaid.²⁴ In all cases except where leave is granted for an employee’s own serious health condition, the employer may require use of any employer provided paid family leave. An employer may require the employee to use up any paid sick leave if leave is taken for the employee’s serious health condition or that of a spouse, parent or child.²⁵

If the need for leave is foreseeable, the employee must generally provide 30 days notice to the employer.²⁶ An employee is also required to schedule any medical-related leave so as not to disrupt the operations of the employer.²⁷ Where a husband and wife are jointly employed by the same employer, they are entitled to only a total of 12 weeks leave between them; however, where the FMLA leave is to treat or care for the serious health condition of one of the spouses or of a child, each spouse is entitled to 12 weeks of FMLA leave.²⁸

An employee is entitled to medical leave under the FMLA only if a “serious health condition” exists. A “serious health condition” is an “illness, injury, impairment, or physical or mental condition” involving either inpatient care or continuing treatment by a health care provider.²⁹ It includes an incapacity of more than three days requiring two or more health care visits (or one visit and continuing treatment); any period of incapacity related to pregnancy or prenatal care; any period of incapacity (or treatment for incapacity) due to a chronic serious health condition, whether or not treatment for the condition is effective; and to receive treatment for a condition that would likely cause incapacity of more than three days, if left untreated.³⁰ Treatment includes taking prescription medication.³¹ Before approving FMLA leave, an employer may require medical certification of the existence of a serious health condition.³² An employee is entitled to medical leave for her own serious health condition only when the employee is “unable to perform the functions of [her] position.”³³

The FMLA provides “job security” to employees who must be absent from work because of their own illnesses.³⁴ The Act prohibits an employer’s consideration of an employee’s use of FMLA-covered leave in making employment decisions. An employer violates the statute just by taking an employee’s need for FMLA leave into account in an employment action.

An employer must restore an employee on FMLA leave to the same or equivalent position upon the employee’s return to work, unless the employee is among the top 10 percent highest paid salaried employees (a “key employee”) and the employer can show grievous economic harm from the reinstatement.³⁵ An employer cannot penalize an employee who takes FMLA leave by depriving her of benefits she accrued prior to the leave, but is not required to credit the employee for any benefits that would have accrued during the leave period.³⁶ An employer must continue to pay the employee’s health care premiums during any period of FMLA leave.³⁷ The employer may recoup the payments if the employee does not return to work after the expiration of the FMLA leave, unless the cause is her own serious health condition, that of a spouse, child or parent, or other circumstance beyond the control of the employee.³⁸ Special limitations apply to employees of local educational agencies, i.e., public and private elementary schools.³⁹

Union-employer collective bargaining agreements (“CBAs”) will often cover the same subject areas as the FMLA. In general, a CBA can provide employees greater but not lesser rights than federal law. When a CBA and the FMLA have different

requirements for taking leave, the employee is entitled to have the less stringent requirements applied. Where a CBA governs the employee's return to work/fitness for duty certification obligations, "those provisions shall be applied,"⁴⁰ but not in a manner that otherwise violates the FMLA or the ADA. If a CBA requires more stringent verification for paid leave than the FMLA does, the employee must comply with the more stringent verification requirements to obtain the paid leave, but not the protections of the FMLA.⁴¹ Where an employee needs intermittent leave, the employer may temporarily transfer that employee to an alternative, equivalent position that better accommodates the recurring leave, but only if consistent with a governing CBA.⁴²

III. BASIC TENETS OF WORKERS' COMPENSATION LAW

Workers' compensation laws vary from state to state but there are certain commonalities. The goal of workers' compensation is to provide sure and certain relief for workers, injured in their work, and their families and dependents. Workers' compensation is intended as the exclusive remedy for almost all accidental injuries an employee sustains in the workplace. On the other hand, workers' compensation is not the exclusive remedy for intentionally inflicted injuries, or for injuries caused by non-employees. Workers' compensation also covers disabling conditions caused by occupational diseases. Most workers' compensation laws do not have an exemption for small employers: one employee is sufficient. As a result, with a few limited exceptions, almost all workers are covered by workers' compensation.

A worker must notify his employer of a workplace accident very quickly. That starts a process that leads to the filing of a workers' compensation claim. The employee usually must file a certificate from his or her attending physician along with his or her workers' compensation claim. In most circumstances, an employee injured on the job receives payments for the injuries suffered under a statutory formula, as well as medical expenses. Because paid benefits are a statutory entitlement to a qualifying employee, an employer cannot require the employee to use employer provided benefits as a substitute. As soon as an employee's recovery from a disabling condition is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the injury, the workers' compensation payments usually cease. If full earning power is not restored, the employee may receive continuing benefit payments for a percentage of the differential between her previous and present wages.

Although workers' compensation law uses such terms as "disability," "total disability," and "permanent disability" in calculating the amount of benefits that are owed, the concept of "disability" under workers' compensation law is not the same as that under the ADA. A "permanent disability" refers to the loss of use of one or more body parts, up to and including a condition permanently incapacitating the worker from performing any work at any gainful occupation. This has little to do with "disability" within the meaning of the civil rights laws such as the ADA. This can be a source of confusion to both employers and employees alike.

IV. EXAMPLES OF THE INTERPLAY BETWEEN DISABILITY, FAMILY LEAVE AND WORKERS' COMPENSATION LAWS.

Given the scope of the laws that might apply to a worker needing time off from work, it will come as no surprise that just because an employee is disqualified from receiving the protections of one of the statutes does not mean that benefits are unavailable under one or more of the others. Moreover, an employer practice permitted by one of these laws may nevertheless be forbidden by another that takes precedence.

To resolve some of the confusion, the EEOC has issued an official "Guidance on Workers Compensation and ADA" (1996). The EEOC has also issued an informal "Fact Sheet on the FMLA, ADA, and Title VII" (1996). The EEOC's "Guidance on Reasonable Accommodation under the ADA" (1999) also considers the overlap of the ADA and the FMLA in that context. Unfortunately, they do not deal with state laws.

The following scenarios represent just a few of the situations where there may be an interplay between disability, family leave, and workers' compensation laws.

A. Leave of Absence from Work

Where an employee seeks time off from work to take care of a relative with a serious health condition, the only leave available as a matter of law is under the FMLA. If the relative is a brother or sister with a serious health condition, there is no entitlement to leave at all. Of course, the employer may have its own leave policies, which may permit the employee to take more, but not less, leave than the FMLA provides. If the employer has a paid family leave policy, the employer may require the employee to take

that leave as FMLA leave. If the employee's paid leave runs out before his or her FMLA leave does, then the employee must be allowed to take the remainder of the 12 weeks as unpaid leave. If the FMLA leave runs out first, the employee may continue to receive employer leave, but will not be entitled to the FMLA's statutory guarantees such as reinstatement and continued paid health care.

When the reason for the leave is the employee's own serious health condition, the situation is more complicated. If the serious health condition is the result of a workplace injury, then the employee may be entitled to time off from work under workers' compensation, the FMLA, and disability rights law. In such a case, the employer may require the employee to designate (up to 12 weeks of) the workers' compensation absence as FMLA leave, if the injury also constitutes a "serious health condition."⁴³ So long as the employee qualifies for workers' compensation benefits, the employer may not require the employee to use any other type of paid benefits during the absence. If the entitlement to workers' compensation benefits ends before the expiration of the employee's entitlement to FMLA leave, the employer may then require, or the employee may choose, to take paid medical or other employer provided leave and designate it as FMLA leave.

In most circumstances, the FMLA requires the employer to reinstate the employee to his former position (or an equivalent one) at the end of his leave. Workers' compensation law does not make the same guarantee, although retaliation for filing a

workers' compensation claim is unlawful. So if the employee's right to FMLA leave expires before his entitlement to workers' compensation does, then the employer does not necessarily have to return the employee to the same or equivalent position. But if the employee remains "disabled" under the ADA, then the employer will be obligated to return the employee to his original position, unless a leave of absence from his original position constitutes an undue hardship to the employer. Even then, the disabled employee may still be entitled to reassignment to another position.

The interplay between a "disability" under the ADA and a "serious health condition" under the FMLA can be complicated. Not all ADA disabilities are FMLA serious health conditions and not all FMLA serious health conditions are ADA disabilities.⁴⁴ Moreover, there is a basic tension between the FMLA's definition of "serious health condition" and the ADA's definition of "qualified individual with a disability." For an employee to be entitled to FMLA leave for her own "serious health condition" she must be "unable to perform the functions" of her position.⁴⁵ The Department of Labor has ruled that this has the same meaning as "essential functions" under the ADA.⁴⁶ However, only a "qualified individual with a disability" is entitled to protection under the ADA. By definition, a person must be able to "perform the essential functions of her position" to be a "qualified individual with a disability".⁴⁷ It would seem that a person who qualifies for FMLA leave for "a serious health condition" is not protected by the ADA.

The EEOC has solved this problem by declaring that a leave of absence is a reasonable accommodation under the ADA, unless it constitutes an undue hardship. Therefore, an employee on an FMLA leave of absence that also qualifies as a reasonable accommodation remains “a qualified individual with a disability” if all other statutory criteria are met. The potential difficulty with this solution is that the ADA does not list a leave of absence as an example of reasonable accommodation. Although most courts, including the Ninth Circuit,⁴⁸ have accepted the EEOC’s position, a few courts have found attendance to be an “essential job function” and rejected medical leave as a permissible accommodation.⁴⁹

Although under the FMLA an employer may require an employee requesting intermittent leave or a reduced schedule to transfer to another position if the alternative position better accommodates the leave request,⁵⁰ such a transfer is forbidden under the ADA unless the employer can show undue hardship from maintaining the employee in her original position.

B. Medical Examinations

The ADA and FMLA provisions and regulations governing medical examinations of current employees generally complement each other. An employer may require an employee to obtain a medical certification that she is unable to perform the essential duties of her position before allowing her to take FMLA leave, and may require her to obtain a medical certification that she is again able to perform those duties before

permitting her to return to work.⁵¹ Unemployment law usually allows employers who are self-insured to conduct medical examinations of employees claiming or receiving workers' compensation benefits. All such examinations must comply with the ADA's confidentiality requirements.⁵² While the ADA authorizes employer inquiries into the ability of current employees to perform job-related functions, the ADA requires medical examinations of current employees to be "job related and consistent with business necessity."⁵³

C. Return to Work and Light Duty

Once a disabled employee who is on leave can again perform the essential functions of her position with or without reasonable accommodation, the employer must allow her to return to work, even if she has not fully recovered from an injury or medical condition. An employer cannot require the employee to return to "full duty" because "full duty" may include marginal as well as essential job functions.⁵⁴ FMLA regulations specifically allow enforcement of applicable "return to work provisions" of state or local law, or of a collective bargaining agreement.⁵⁵ But those provisions must comply with the ADA.

The term "light duty" is one that has developed with regard to workers' compensation law. As the EEOC has recognized, the term "light duty" is a colloquial term that has a number of different meanings.⁵⁶ It can refer to (1) a position created for an employee while he recovers from his injury; (2) a modification of the employee's

current position; and (3) an existing alternative position with less demanding duties. The ADA does not ever require the employer to create a position as a form of reasonable accommodation to a disabled employee. Accordingly, an employer is not required to create a new light duty position for a disabled employee. On the other hand, if the employer regularly creates light duty positions, but fails to create one for a disabled employee, the employer will likely be liable for unlawful disparate treatment.

The general ADA rules regarding reasonable accommodation apply to “light duty” modifications and reassignments. An employer must modify a current employee’s existing position by transferring the job’s non-essential functions to other employees, unless that would create an undue hardship.⁵⁷ Reassignment to a vacant position is specifically listed as a permissible accommodation under the ADA.⁵⁸ The EEOC has declared that when there exists no other reasonable accommodation, reassignment to a vacant position for which the employee is qualified is required.⁵⁹ The employer must first attempt to identify an equivalent position in which to reassign the employee, and then a lower graded position. Reassignment to a higher graded position is never required. Once an employer reassigns the employee to another position, the employer may not terminate the employee because she is no longer qualified to perform her original position.⁶⁰

D. Pregnancy and Child Care

The FMLA's regulations explicitly recognize that pregnancy may constitute a "serious health condition" entitling the employee to up to 12 weeks of leave.⁶¹ A pregnant employee may also qualify as "disabled" under the ADA. If she does, she is entitled to leave, even in excess of any FMLA leave she may have, as a reasonable accommodation, unless the employer can show undue hardship. The FMLA explicitly allows new parents to take leave for the care for new born children, newly adopted children, or children newly placed in foster care.⁶² However, if the employee has exhausted all of her yearly FMLA leave allotment due to incapacity from her pregnancy, she is not entitled to any leave for child care.⁶³

V. CONCLUSION

Even a well-intentioned employer can fail to appreciate its multiple obligations to an employee who requests leave or becomes disabled in the workplace. The legal consequences to the employer, and the real-life consequences to the employee, can be significant. It is therefore crucial that employees have a full understanding of their rights.

¹ 42 U.S.C. § 12101 *et seq.*

² 42 U.S.C. § 12101(b)(1).

³ 42 U.S.C. § 12117(a).

⁴ 42 U.S.C. § 12112(a).

⁵ 42 U.S.C. § 12111(8).

⁶ The issue of “reasonable accommodation” does arise when an employee claims his religious practices or beliefs conflict with a job requirement.

⁷ *Murphy v. United Parcel Service, Inc.*, 119 S. Ct. 2133 (1999); *Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999); *Albertson’s Inc. v. Kirkingburg*, 119 S. Ct. 2162 (1999).

⁸ The ADA statutory definition of “disability” is: “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of having such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2).

⁹ *See Sutton*, 119 S. Ct. at 2154, 2156-57 (Stevens, J. dissenting).

¹⁰ 42 U.S.C. § 12112(b)(5)(A).

¹¹ 42 U.S.C. § 12111(9)(B); WAC 162-22-065(2)(a).

¹² *See* Interpretive Guidance on Title I of the ADA (“ADA Interpretive Guidance”), Appendix to 29 C.F.R. Part 1630, at § 1630(o)(2).

¹³ *U.S. Airways v. Barnett*, 535 U.S. 391 (2002).

¹⁴ 42 U.S.C. § 12112(d)(4)(A); WAC 162-22-090(1).

¹⁵ EEOC Guidance on Reasonable Accommodation.

¹⁶ 42 U.S.C. § 12112(d)(1) & (3).

¹⁷ 29 U.S.C. § 2601(2). The Department of Labor has issued detailed regulations to implement the FMLA: 29 C.F.R. Part 825 (1995).

¹⁸ 29 U.S.C. § 2612(a)(1).

¹⁹ 29 U.S.C. § 2611(4)(A)(i).

²⁰ 29 U.S.C. § 2611(2)(A).

²¹ 29 U.S.C. § 2612(b)(1).

²² 29 U.S.C. § 2612(b)(2).

²³ 29 U.S.C. § 2612(c).

²⁴ 29 U.S.C. § 2612(d).

²⁵ *Id.*

²⁶ 29 U.S.C. § 2612(c)(1).

²⁷ 29 U.S.C. § 2612(c)(2).

²⁸ 29 U.S.C. § 2612(f).

²⁹ 29 C.F.R. § 825.114(a)(1)-(2).

³⁰ 29 C.F.R. § 825.114(a)(2).

³¹ 29 C.F.R. § 825.114(b).

³² 29 U.S.C. § 2613.

³³ 29 U.S.C. § 2612(a)(1)(D).

³⁴ *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112, 1119 (9th Cir. 2001).

³⁵ 29 U.S.C. § 2614(a)(1).

³⁶ 29 U.S.C. § 2614(a)(2)-(3).

³⁷ 29 U.S.C. § 2614(c)(1).

³⁸ 29 U.S.C. § 2614(c)(2).

³⁹ 29 U.S.C. § 2618.

⁴⁰ 29 C.F.R. § 825.310(b).

⁴¹ 29 C.F.R. § 825.207(h).

⁴² 29 C.F.R. § 825.804(a)-(b).

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- ⁴³ 29 C.F.R. § 825.207(d)(2).
- ⁴⁴ Fact Sheet on FMLA, ADA, and Title VII at #9.
- ⁴⁵ 29 U.S.C. § 2612(a)(1)(d).
- ⁴⁶ 29 C.F.R. § 825.115.
- ⁴⁷ 42 U.S.C. § 12111(8).
- ⁴⁸ *Nunes v. Wal-mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999).
- ⁴⁹ *See, e.g., Cehrs v. Northeast Ohio Alzheimer's Research Cntr.*, 959 F. Supp. 441 (N.D. Ohio 1997), *rev'd*, 155 F.3d 775 (6th Cir.1998).
- ⁵⁰ 29 U.S.C. § 2612(b)(2).
- ⁵¹ 29 C.F.R. §§ 823.305(a); 825.308; 825.310.
- ⁵² *See generally* 42 U.S.C. § 12112(d); 29 C.F.R. § 1630.14(c).
- ⁵³ 42 U.S.C. § 12112(d)(4)(A)-(B).
- ⁵⁴ EEOC “Guidance on Workers’ Compensation and the ADA”, at #13.
- ⁵⁵ 29 C.F.R. § 825.310(b).
- ⁵⁶ EEOC Guidance on Workers’ Compensation and the ADA.
- ⁵⁷ ADA Interpretive Guidance, 29 C.F.R. Pt. 130 App., § 1630(o)
- ⁵⁸ 42 U.S.C. § 12111(9)(B).
- ⁵⁹ ADA Interpretive Guidance, 29 C.F.R. Pt. 130 App., § 1630(o). Some courts have disagreed, holding that an employee loses the protection of the statute when she ceases to be qualified for her original position. *See, e.g., Schmidt v. Methodist Hosp.*, 89 F.3d 342, 345 (7th Cir. 1996).
- ⁶⁰ *Smith v. Midland Brake*, 180 F.3d 1154 (10th Cir. 1999); *Gile v. United Airlines, Inc.*, 95 F.3d 492 (7th Cir. 1996).
- ⁶¹ 29 C.F.R. § 825.114(a)(2)(ii).

⁶² 29 U.S.C. § 2612(a)(1)(A)-(B).

⁶³ *Id.*

**DISABILITY RIGHTS, FAMILY LEAVE, AND
WORKERS' COMPENSATION LAW COMPARED**

	DISABILITY	FAMILY LEAVE	WORKERS' COMP.
Triggering Health Condition	Disability	Serious health condition	Disabling injury or illness suffered in the course of employment

Notice to Employer	Employer must have notice of employee's disability	If foreseeable, then 30 days; otherwise "as practicable"	Forthwith
Length of Leave	Can't be indefinite; end depends on when "undue hardship" arises	12 weeks per year; (In WA pregnancy + child care may = 24 weeks)	Depends on length of incapacity
Ability to Work	Must be "qualified individual with disability"	To qualify for leave for own serious health condition, must be unable to perform job	Incapacity or reduced earning capacity

Paid Leave Available?	Not unless employer's policies provide it	No; but paid leave may be substituted for unpaid leave	Yes
Health Benefits Paid During Leave?	Only if employer generally does so	Yes	No
Intermittent Leave Permissible?	If reasonable accommodation and not undue hardship	If medically necessary for serious health condition	No (except for medical exam)

Must Leave Request Be Granted?	If reasonable accommodation and not undue hardship	Yes, if notice and certification requirements met	Yes
Reinstatement Required?	Yes, unless undue hardship	To original or equivalent position; but not top 10% in pay	No
Employer Coverage	ADA-15 employees	FMLA-50	1